Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting Efficient Use of Spectrum Through	)	WT Docket No. 00-230
Elimination of Barriers to the Development of	)	
Secondary Markets	)	

COMMENTS OF AT&T WIRELESS SERVICES, INC.

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Pursuant to Section 1.419 of the Commission's rules,[1/] AT&T Wireless Services, Inc. ("AWS") hereby submits its comments on the Commission's Further Notice of Proposed Rulemaking issued in the above-captioned proceeding.[2/]

INTRODUCTION AND SUMMARY

In the *Report and Order*, the Commission adopted a set of market-friendly policies that will have far-reaching and positive effects for the wireless industry, consumers, and the U.S. economy. AWS commends the Commission for this bold action, and urges it to take the opportunity now to expand and refine those policies by relying on the marketplace instead of regulation whenever possible. In particular, the Commission should decline to establish any new information collection requirements and allow the private sector to determine if additional mechanisms are needed to promote the development of new technologies. Not only is the government ill equipped to predict market needs and technological developments, but premature adoption of a secondary markets construct based on "opportunistic" usage could impede the

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1/ 47 C.F.R. § 1.419 (2003).

2/ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 20604 (2003) ("*FNPRM*" or "*Report and Order*").

deployment of both licensed services and the as yet unproven technology the Commission hopes to encourage.

AWS also strongly urges the Commission to forbear from application of its prior approval rules for most spectrum leases, and to remove even the notification requirements for any spectrum transaction (sale or lease) that would be considered *pro forma* under the Commission's new *de facto* control standard. Finally, the Commission should eliminate the requirement that lessees satisfy the licensees' use and eligibility requirements. Given that the licensee is not surrendering its authorization under a lease model, application of this rule serves no useful purpose and – in the context of designated entities – would actually hinder satisfaction of the Commission's and Congress' goal of increased participation by such companies in the spectrum market.

I. ADDITIONAL INFORMATION COLLECTION REQUIREMENTS ARE NOT NECESSARY

The Commission asks whether sufficient information is publicly available for the smooth functioning of the secondary market and "whether and to what extent the Commission should support or encourage the establishment of additional information services . . . ."[3/] At this point, new information collection requirements and the adoption of additional mechanisms – such as spectrum clearinghouses or brokers – would be both unnecessary and burdensome. The rules already established by the Commission in the *Report and Order*, as well as existing mechanisms to compile and report data on wireless markets, are sufficient to ensure an efficiently functioning secondary market for spectrum.

[3/] *FNPRM* ¶¶ 225-28.

All parties that may want to participate in the leasing process already have full access to the information necessary to determine the availability of spectrum in any specific geographic area in which they are interested, the identity of the licensees, and the services that are authorized for such spectrum. Indeed, the Commission's Universal Licensing System ("ULS") contains much of the relevant data and is easily accessible by carriers, potential non-carrier lessees, and brokers. Thus, there is no reason for the Commission to engage in the difficult business of attempting to predict market needs. As the Commission recognizes, the private sector "is better suited both to determine what types of information parties might demand, and to develop and maintain information on the licensed spectrum that might be available for use by third parties."[4/] Further, given the extreme fluidity of the market and technology, government-compiled information would be rendered quickly obsolete or inadequate. The private sector, by contrast, has a much greater ability to respond rapidly and effectively to changing needs.

There is no reason to believe the market has failed or will fail to establish sufficient mechanisms for information flow to facilitate spectrum leasing and the policies established in the Secondary Markets proceeding. Potential lessees and lessors have every incentive to provide the information necessary to ensure that transactions can proceed smoothly. Moreover, a number of brokers operate in the market today to facilitate spectrum sales and purchases, and they have the requisite expertise to assist in spectrum leasing as well. In the event some need becomes apparent that the market is not able to fill, the Commission may – at that time, faced by a concrete problem – take tailored action to address any such concerns. Until then, however, allowing the market, rather than anticipatory government regulation, to determine the type of information needed and the mechanisms for its retrieval and dissemination would maximize the

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[4/] *Id.* ¶ 226.

relevance of the resulting data and ensure the timeliness and relevance of information in a rapidly shifting market. By contrast, new data collection requirements would require the diversion and addition of industry resources, increase transaction costs, and bog down the secondary market with unnecessary reporting obligations.

II. EXISTING SECONDARY MARKET RULES WILL FUEL ACCESS TO NEW TECHNOLOGIES WITHOUT FURTHER COMMISSION ACTION

The Commission should not adopt its proposal to establish special rules in order to allow "opportunistic devices" to operate on spectrum in currently licensed bands "during the near term."[5/] As with proposals to augment information collection and dissemination mechanisms, consideration of ways to promote a yet unproven technology is premature. There will be sufficient opportunity for further regulation in the unlikely event it is required at some point in the future.

Not only are rules unnecessary today to ensure the development of new technologies, establishment of such a regulatory scheme would be entirely misguided. As AWS has explained previously, the record developed in the last year lays bare the fundamental problem in considering the introduction of new unlicensed regimes operating in licensed bands – interference avoidance technologies do not currently exist to protect authorized services from harmful interference.[6/] In addition to interference issues and the attendant operational and capital impacts, new operations or devices introduced without authorized providers' consent would adversely affect their ability to enhance spectrum efficiency and roll out innovative services.

5/ *Id.* ¶ 234.

6/ *Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 02-380, AWS Reply Comments, at 7-8, 14 (filed May 16, 2003) (citing numerous commenters' concerns that the Commission could decide fundamental issues of spectrum policy and unlicensed operations based

Establishing a secondary markets construct for opportunistic usage at this time would be unwise because, not only is the technology unproven, the technical and operational parameters of different applications and systems using such technology are unknown. This raises the danger that premature creation of secondary market models could steer technology development or, worse, stifle innovation in both licensed and any potential new opportunistic services. Although the Commission has initiated discussions regarding opportunistic usage (and interference temperature theory as well), it has yet to reach conclusions on any aspect of these novel technologies or issues.[7/] The Commission must fully deliberate opportunistic usage – and must exercise great caution in doing so – *before* presuming an opportunistic regime that serves as a springboard for additional Commission rules on secondary markets policy.[8/] The Commission should defer this aspect of the *FNRPM* accordingly.

(cont.)
upon untested models and futuristic engineering); *see also Commission Seeks Public Comment on Spectrum Policy Task Force Report*, ET Docket No. 02-135, AWS Comments (filed Jan. 27, 2003).

7/ *See, e.g., Amendment of Parts 1, 21, 63, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advances Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd. 6722, ¶¶ 143-48 (2003); *Establishment of an Interference Temperature Metric to Quantify and Manage Interference and to Expand Available Unlicensed Operation in Certain Fixed, Mobile and Satellite Frequency Bands*, ET Docket No. 03-237, Notice of Inquiry and Notice of Proposed Rulemaking, FCC 03-289, ¶¶ 29-51 (rel. Nov. 28, 2003) ("*Interference Temperature NOI and NPRM"*).

8/ As Commissioner Adelstein recently stated with respect to the interference temperature proceeding, "I think it is very clear that we are exploring an entirely new concept in the interference temperature model, and it is quite premature to actually discuss proposed rules when the Commission has not even engaged in a preliminary discussion on the interference temperature approach as a whole." *See Interference Temperature NOI and NPRM*, Separate Statement of Commissioner Jonathan S. Adelstein Approving in Part, Concurring in Part.

III. THE COMMISSION SHOULD FORBEAR BROADLY FROM APPLICATION OF ITS PRIOR APPROVAL AND NOTIFICATION REQUIREMENTS

AWS agrees that, in many circumstances, the Commission should expand its forbearance of the prior approval requirement for spectrum transactions.[9/] As the Commission recognizes, forbearance would further the public interest by "enabl[ing] parties to a spectrum lease to put their business plans into effect with reduced regulatory delay and transaction costs," which will permit the secondary market to operate more efficiently, improve access to spectrum by all interested parties, and increase the innovative and advanced wireless services available to consumers."[10/] Accordingly, forbearance from the prior approval provisions should be broadly implemented.

Whether or not a transaction may proceed with notification only should not be conditioned on whether the lessee complies with the licensee's use and eligibility restrictions. Regardless of whether the transaction involves a long-term or short-term lease, the original licensee will continue to hold the authorization, and there is no reason to treat the lessee as a new owner. In particular, lessees should not have to match a licensee's designated entity status in order to proceed with a lease agreement under post-closing notification procedures. As discussed more fully below, there are a number of ways for designated entity licensees to participate in the wireless market, including as lessors of their spectrum assets, and the public interest would not be served by hampering such arrangements through the imposition of regulatory processes not applicable to other spectrum holders.

9/ *See FNPRM* ¶¶ 237-87.

10/ *Id.* ¶ 273.

Regardless of whether the Commission changes the prior consent requirements for leasing in general, it should ensure that stricter standards are not imposed in the spectrum leasing context than currently apply to transfers of control. Specifically, today most intra-company license assignments or transfers of control are treated as *pro forma* and subject to post-closing notification only,[11/] yet under the rules adopted in the *Report and Order*, a *de facto* long-term lease between the same two entities would require prior approval. At the very least, the Commission should correct this anomaly by forbearing from the prior consent rules for any leasing transaction that would be considered *pro forma* if it were a transfer of control.

AWS, however, urges the Commission to go one step further by removing even the notification requirements for any spectrum transaction – lease or sale – that would be considered *pro forma* under the Commission's new control standard. Although there is a basis for updating ULS about a change in a licensee name (for example, if a license is assigned from a company to its wholly-owned subsidiary), AWS is not aware of any rationale for insisting on notification every time an intermediary parent is inserted in an ownership chain or a company decides to designate one subsidiary as the operating unit and retain another as the licensee. The objective underlying the *Report and Order* – streamlining the regulatory process to facilitate the smooth functioning of the secondary market – should be applied whenever it makes sense, and in the case of intra-company *pro forma* transactions, it makes sense to remove both the prior approval and notification requirements.

Finally, as the Commission proposes, it should eliminate the *Intermountain Microwave* control standard in the context of all spectrum transactions – not just for leasing arrangements.

[11/] Under certain circumstances, such as when the licensee is a designated entity or there is proxy contest, the Commission will not accord the transaction *pro forma* treatment.

For leasing purposes, the Commission appropriately replaced "the outdated *Intermountain Microwave* standard that has been in place since 1963 with a refined standard that better accords with [the Commission's] contemporary market-oriented spectrum policies, fast-changing consumer demands, and technological advances."[12/] For the same reasons, the Commission should substitute *Intermountain Microwave* with the newly-adopted standard whenever it is necessary to determine where *de facto* control of spectrum lies, including license assignments, stock transfers, designated entity incentives, spectrum aggregation limits, and management agreements. Not only have the comprehensive changes in the wireless market since the adoption of *Intermountain Microwave* 40 years ago rendered that standard obsolete in today's commercial world, standardizing the control test across the gamut of spectrum transactions subject to the Commission's jurisdiction would simplify the Commission's review process and lower regulatory obstacles that inhibit full market participation.

IV. THE COMMISSION SHOULD NOT APPLY DESIGNATED ENTITY ELIGIBILITY REQUIREMENTS TO LESSEES

Application of the Commission's designated entity eligibility requirements to lessees is unnecessary to serve the purposes of those rules and would impede the full functioning of the secondary market sought by the Commission.[13/] Indeed, allowing designated entities to lease to any potential lessee, regardless of whether that entity satisfies the designated entity requirements, would promote the goals of Section 309(j) by permitting designated entities to remain fully involved in the provision of spectrum-based services.

12/ *FNPRM* ¶ 3

13/ *See id.* ¶ 323.

There is no reason to believe that Congress intended to limit designated entities to only one form of participation in the spectrum market – construction and operation of a facilities-based network. Rather, a leasing model allows such companies to exploit their spectrum acquisitions without exiting the market. As such, they can make the same rational economic business decisions as other entities – for instance, leasing spectrum that they may not be ready to fully utilize or to conserve capital – without frustrating the objectives of the Commission's and Congress' designated entity incentives. By contrast, failure to provide full flexibility and the imposition of unjust enrichment penalties in the leasing context could force designated entities out of the market entirely.

In addition to the obvious benefits to designated entities, allowing unfettered secondary market leasing would ensure that spectrum that would otherwise lie fallow or be underutilized is put to its best use. This would benefit consumers and the public interest by allowing carriers to expand existing services, improve service quality, lower prices, and deploy new and innovative services.[14/] Instead of imposing artificial and unnecessary restrictions on designated entities, the Commission should adopt policies that promote the full employment of the secondary market mechanisms adopted in the *Report and Order*.

[14/] *See Report and Order* ¶¶ 42-45 (detailing the many benefits of a robust secondary market).

CONCLUSION

For the foregoing reasons, AWS respectfully requests that the Commission allow the market to identify and satisfy information needs and determine what new technologies should be deployed; extend its forbearance policies as broadly as possible; and modify its rules to allow designated entity licensees to lease spectrum to any potential lessee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan Duarte, hereby certify that on this 5th day of December, 2003, the foregoing Comments of AT&T Wireless Services, Inc. were filed electronically on the FCC's Electronic Comment Filing System and electronic copies were served via electronic mail to the following:

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